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No. 119, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF CONNECTICUT,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS,

Plaintiffs,

v.

STATE OF NEW HAMPSHIRE,

Defendant.

ANSWER OF DEFENDANT STATE OF NEW HAMPSHIRE TO THE COMPLAINT OF THE UTILITY INTERVENORS

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Defendant State of New Hampshire answers the Complaint of United Illuminating Company, New England Power Company, the Connecticut Light & Power Company and Taunton Municipal Lighting Plant ("the Utility Intervenors") as follows:

JURISDICTION AND STANDING

Complaint ¶ 1: The jurisdiction of this Court is based upon art. III, § 2, cl. 1 and 2 of the United States Constitution and 28 U.S.C. § 1251(a)(1)(1991).

ANSWER: Admitted that the Plaintiffs commenced this action and sought to invoke this Court's original jurisdiction but denied that this is an appropriate case for the exercise of original jurisdiction and denied that the Plaintiffs have standing to complain that the New Hampshire tax on Nuclear Station Property (the "Nuclear Property Tax") violates any provision of the Constitution or federal law. Further answering, the State of New Hampshire states that the Utility Intervenors have plain, speedy and adequate remedies to challenge the validity of the tax and have not exercised those remedies.

Complaint ¶ 2: The original complaint filed by plaintiffs seeks a declaratory judgment, pursuant to 28 U.S.C. § 2201 (1991), that the New Hampshire "Tax on Nuclear Station Property," 1991 N.H. Laws c. 354 (to be codified as N.H. Rev. Stat. Ann. ("RSA"), Chapter 83-D) (the "Seabrook Tax"), violates the rights and protections afforded to plaintiffs by the United States Constitution under art. VI, cl. 2 (Supremacy Clause); art. I, § 8 (Commerce Clause); the Equal Protection Clause of the Fourteenth Amendment; and art. IV, § 2 cl. 1 (Privileges and Immunities Clause); it also seeks to enjoin enforcement of the tax.

ANSWER: Admitted that Paragraph 2 describes certain relief the Plaintiffs seek in this action. The tax on Nuclear Station Property was codified as RSA 83-D on July 2, 1991.

Complaint ¶ 3: The Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation and transmission of electricity in interstate and intrastate commerce.

ANSWER: Admitted that the Seabrook Nuclear Station, located in Seabrook, New Hampshire, is a facility used for the generation of electricity and that some or all of the electricity generated may be, from time to time, sold in interstate commerce and some or all may be, from time to time, sold in intrastate commerce. Denied that the Seabrook Nuclear Station is used for the transmission of electricity in either interstate or intrastate commerce. Further answering, the State of New Hampshire states that the Nuclear Property Tax which is challenged in this case is a tax on "Nuclear Station Property," which is defined in the Act to exclude transmission lines.

Complaint ¶ 4: Intervenors are owners of the Seabrook Nuclear Station, and are liable for payment of taxes pursuant to the provisions of the Seabrook Tax. The individual intervenors, and their respective ownership interests in the Seabrook Nuclear Station, are as follows:

a. The United Illuminating Company is a Connecticut corporation with its principal place of business in New Haven, Connecticut. The United Illuminating Company owns and leases an aggregate 17.50% interest in the Seabrook Nuclear Station.

b. New England Power Company ("NEP"), a wholly owned subsidiary of New England Electric System ("NEES"), is a Massachusetts corporation with a principal place of business in Massachusetts. NEP owns an undivided 9.9% common interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of NEES, Massachusetts Electric Company and Narragansett Electric Company, passing on to them the costs of the Seabrook Tax.

c. The Connecticut Light and Power Company, a wholly owned subsidiary of Northeast Utilities, is a Connecticut corporation with its principal place of business in Berlin, Connecticut. The Connecticut Light and Power Company owns 4.05985% of the Seabrook Nuclear Station.

d. Canal Electric Company, a wholly owned subsidiary of Commonwealth Energy System ("CES"), is a Massachusetts Business Trust with its principal place of business in Cambridge, Massachusetts. Canal Electric Company owns a 3.52% interest in the Seabrook Nuclear Station. It sells power wholesale to two other wholly owned subsidiaries of CES, Cambridge Electric Light Company and Commonwealth Electric Company, passing on the costs of the Seabrook Tax.

e. Montaup Electric Company is a wholly owned subsidiary of Eastern Edison Company ("EEC"), which, in turn, is a wholly owned subsidiary of Eastern Utilities Associates ("EUA"), with its principal place of business in Boston, Massachusetts. Montaup Electric Company owns 2.89% of the Seabrook Nuclear Station. It sells power wholesale to EEC and another wholly owned subsidiary of EUA, Blackstone Valley Electric Company, passing on the costs of the Seabrook Tax.

f. Taunton Municipal Lighting Power Plant is a quasi-autonomous department of the City of Taunton, a municipal corporation situated in Bristol County, Massachusetts. Taunton Municipal Lighting Plant owns 0.10034% of Seabrook Nuclear Station.

ANSWER: Admitted that the intervenors are some of the joint owners of the Seabrook Nuclear Station, except that the State of New Hampshire is informed and believes that the

percentage ownership interest of New England Power Company is 9.9577%, that the interest of Canal Electric Company is 3.5232% and that the interest of Montaup Electric Company is 2.8999%. The State of New Hampshire is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning (i) the purchasers of wholesale power from the Utility Intervenors, (ii) how the costs of the Nuclear Property Tax are treated by Canal Electric Company, Montaup Electric Company or the other Utility Intervenors for rate making purposes for either retail or wholesale customers and (iii) how internal tax allocation agreements, which govern the allocation of tax liabilities and benefits among affiliates of a registered holding company pursuant to Securities and Exchange Commission regulations, determine the amount of Nuclear Property Tax actually paid by each company. Further answering, the State of New Hampshire is informed and believes that, in addition to the two wholly owned subsidiaries mentioned in ¶ 4b, New England Electric System has a wholly owned subsidiary, Granite State Electric Company, that is a New Hampshire corporation serving retail customers in New Hampshire receiving all of its electricity from New England Power Company, and that there is a tax allocation agreement among the subsidiaries of New England Electric System.

Complaint ¶ 5: The defendant is the State of New Hampshire.

ANSWER: Admitted.

Complaint ¶ 6: The Seabrook Tax imposes an *ad valorem* tax upon the value of nuclear station property at the rate of 0.64 percent of valuation. Chapter 354:1 (H.B. 64, § 1) to be codified as RSA 83-D:1. Each of the

intervenors is liable for the tax in proportion to its share of the ownership of the Seabrook Nuclear Station.

ANSWER: Admitted.

Complaint ¶ 7: The Seabrook Tax is linked to a second New Hampshire tax, the New Hampshire Business Profits Tax, by virtue of a credit provision. Pursuant to Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, payment of the Seabrook Tax entitles the taxpayer to a dollar-for-dollar credit against tax on its business profits, but only to the extent that the business profits are attributable to business done in New Hampshire.

ANSWER: Admitted that H.B. 64, which enacted chapter 83-D of the N.H. Rev. Stat. Ann. entitled "Tax On Nuclear Station Property," also amended other provisions of New Hampshire tax law, thereby adopting a new system of taxation for owners of nuclear station property. Admitted that one of the changes made by H.B. 64 is the addition of a new paragraph VI in the list of credits against the Business Profits Tax, in this case for the amount of Nuclear Property Tax paid by *any* utility subject to the Nuclear Property Tax, whether or not located in New Hampshire. Denied that the credit against the Business Profits Tax applies only to the extent that a taxpayer's business profits are "attributable to business done in New Hampshire," as that language does not appear in H.B. 64 or in the statute imposing the Business Profits Tax. Under the new tax system adopted in H.B. 64, a nuclear property taxpayer will always pay the nuclear property tax and the taxpayer's business profits will be taxable in New Hampshire (i) only to the extent that they are so large that they would produce a tax obligation in excess of the amount of Nuclear Property Tax paid and (ii) only to the extent that business profits are fairly apportioned to New Hampshire under the traditional three-factor formula which takes into account sales, payroll and ownership. Because one of the three factors is the ownership of property in New Hampshire and all of the Utility Intervenors have interests in a substantial piece of property located in New Hampshire, all of them will have a portion of their business profits, if any, apportioned to New Hampshire under the formula. It is unknown whether any of the owners will actually have business profits that are sufficiently large to require payment of a tax in excess of the amount of the Nuclear Property Tax.

Complaint ¶ 8: At the same time that New Hampshire enacted the Seabrook Tax, and provided for credit of that tax against the New Hampshire Business Profits Tax, it amended the New Hampshire Franchise Tax to exclude electric utilities from the definition of "public utility" and to exclude sales of electricity from the coverage of that tax. Chapter 354:3 and 4 (H.B. 64, §§ 3 and 4), amending RSA 83-C:1 (II), (IV).

ANSWER: Admitted.

Complaint ¶ 9: The New Hampshire taxation scheme is further discussed at paragraphs 5 through 23 of plaintiffs' complaint. The allegations of those paragraphs are incorporated herein by reference.

ANSWER: Except as amended herein, the State of New Hampshire incorporates its answers to paragraphs 5 through 23 of Plaintiffs' complaint as its answer to paragraph 9 of the Utility Intervenors' complaint. The State of New Hampshire amends its answer to paragraph 7 of the Plaintiffs' complaint to answer further that, in June, 1992, the 35.6% interest in

Seabrook Station presently owned by Public Service Company of New Hampshire will no longer be owned by that company, but instead will be transferred to and owned by a subsidiary of Northeast Utilities, North Atlantic Energy Company. As a result of this change in ownership, the State of New Hampshire also amends its answers to paragraphs 8 and 11 of the Plaintiffs' complaint to state that, upon the change in ownership, Public Service Company of New Hampshire will no longer be subject to the Nuclear Property Tax, which, as alleged in paragraph 8 of the Plaintiffs' complaint, is imposed only on entities with an ownership interest in Seabrook Station. Accordingly, New Hampshire's answer to paragraph 15 is also amended to admit that, after the change in ownership, Public Service Company of New Hampshire, which is alleged in paragraphs 11 and 15 to be the primary provider of electricity to New Hampshire consumers, will no longer be subject to the Nuclear Property Tax, not because of an exemption or a credit, but because it will not be an owner of Seabrook Station.

Complaint ¶ 10: Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 9.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 9 of the Complaint as its answers to the allegations contained in paragraph 10.

Complaint ¶ 11: The operation of the New Hampshire taxation scheme constitutes a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity.

ANSWER: Denied.

Complaint ¶ 12: The operation of the New Hampshire taxation scheme directly and indirectly results in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

ANSWER: Denied.

Complaint ¶ 13: The operation of the New Hampshire taxation scheme is in conflict with the provisions of 15 U.S.C. § 391, which prohibit discriminatory taxation on or with respect to the generation or transmission of electricity, and the Supremacy Clause, art. VI of the United States Constitution.

ANSWER: Denied.

Complaint ¶ 14: Intervenors reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 12 of the Complaint as its answers to the allegations contained in paragraph 14.

Complaint ¶ 15: The operation of the New Hampshire taxation scheme results in discriminatory taxation of businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire

to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

ANSWER: Denied.

Complaint ¶ 16: The operation of the New Hampshire taxation scheme is not fairly apportioned in that it exposes businesses like intervenors doing business in interstate commerce to the risk of multiple taxation on its ownership of the Seabrook Nuclear Station and on its business profits but protects businesses doing business solely in intrastate commerce from the risk of such multiple taxation.

ANSWER: Denied.

Complaint ¶ 17: The burdens of the New Hampshire taxation scheme are not fairly related to the services provided by New Hampshire.

ANSWER: Denied.

Complaint ¶ 18: The operation of the New Hampshire taxation scheme constitutes an impermissible burden on interstate commerce, in violation of art. I, § 8, cl. 3, of the United States Constitution (Commerce Clause).

ANSWER: Denied.

Complaint ¶ 19: The plaintiffs reallege, as though set forth in full, the allegations contained in paragraphs 1 through 12.

ANSWER: The State of New Hampshire incorporates its answers to paragraphs 1 through 12 of the Complaint as its answers to the allegations contained in paragraph 19.

Complaint ¶ 20: The operation of the New Hampshire taxation scheme, without legitimate or rational basis, imposes unequal and discriminatory tax burdens on businesses like intervenors that have ownership interests in the Seabrook Nuclear Station but do not conduct sufficient business activities in New Hampshire to be eligible for full use of the credit provided by Chapter 354:2 (H.B. 64, § 2), amending RSA 77-A:5, against tax on their business profits.

ANSWER: Denied.

Complaint ¶ 21: The operation of the New Hampshire taxation scheme deprives intervenors of the equal protection of the laws guaranteed under the Fourteenth Amendment to the United States Constitution.

ANSWER: Denied.

FIRST AFFIRMATIVE DEFENSE

ORIGINAL JURISDICTION

This is an inappropriate case for the exercise of this Court's original jurisdiction.

SECOND AFFIRMATIVE DEFENSE

LACK OF STANDING

The Utility Intervenors lack standing to invoke the original jurisdiction of this Court.

THIRD AFFIRMATIVE DEFENSE

FAILURE TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Utility Intervenors have failed to state a claim upon which relief may be granted, because:

1. The Nuclear Property Tax is an *ad valorem* tax on property permanently located in the State of New Hampshire assessed at the same rate against each owner of the property, regardless of the state in which the owner is organized. Such a real property tax does not constitute a burden on interstate commerce or a violation of any other provision of the Constitution or federal law under any of the standards applied by this Court to evaluate state taxes.

2. The Utility Intervenors have no constitutional right to require the State of New Hampshire to reenact a franchise tax on New Hampshire electric utilities and the elimination of this tax and the enactment of an evenhanded tax on real property located in the State is not discriminatory.

3. The credit against New Hampshire's Business Profits Tax for amounts paid under the Nuclear Property Tax is available to all of the utility owners of Seabrook Station, regardless of the state in which they are organized, and the provision for such a credit does not render New Hampshire's system for taxation of owners of nuclear property discriminatory. If the actual immediate effect of the new system of taxation for owners of Nuclear Station Property

is considered, it is very likely that all owners will pay only the minimum Nuclear Property Tax amount and that no owners will incur an additional business profits tax obligation.

4. The Nuclear Property Tax is fairly related to the services provided by New Hampshire as that standard has been applied to state taxes challenged under the commerce clause because the measure of the tax (the value of property in New Hampshire) is reasonably related to the extent of contact each of the utilities has with the State of New Hampshire. Moreover, even though the Nuclear Property Tax is a general revenue tax, rather than a user fee for some specific facility or service provided by the State — making a factual inquiry into the extent of State services provided inappropriate in this case — the presence of Seabrook Station in New Hampshire and the unique burdens, costs and risks it presents for the State would support a factual conclusion that the tax is fairly related to the services provided by New Hampshire.

5. The Nuclear Property Tax is not a tax on the generation or transmission of electricity; it is not based on the amount of electricity generated or transmitted; it does not vary with variations in the electrical output of the plant; it is not suspended when the plant ceases operation (as it must for refueling and other contingencies) and the provisions of 15 U.S.C. § 391 are therefore inapplicable. Even if 15 U.S.C. § 391 were applicable, the Nuclear Property Tax would not violate its terms because, for the reasons described in subparagraphs 1 through 3, the tax does not discriminate against out-of-State interests.

6. Because the Nuclear Property Tax on its face and in application is a nondiscriminatory property tax, it does not violate the equal protection or privilege and immunities clauses of the United States Constitution.

THEREFORE, defendant State of New Hampshire respectfully requests that the Court dismiss the Complaint or enter judgment in its favor and against the Utility Intervenors and award it such other relief as may be appropriate.

Respectfully submitted,

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